UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, CRIMINAL NO. 15-20061

Plaintiff, HON. GERSHWIN A. DRAIN

vs.

D-1 MARLON D. CLEVELAND,

Defendant.
_____/

SUPPLEMENTAL SENTENCING MEMORANDUM OF THE UNITED STATES REGARDING RESTITUTION

I. Introduction

Defendant Marlon Cleveland, a former Court Officer of the 36th District Court, has been convicted of stealing tens of thousands of dollars that he collected from numerous civil litigants and thereafter kept for himself. Cleveland's criminal activities stretched over many months and involved dozens and dozens of victims. On December 8, 2015, Cleveland was sentenced to a below guidelines term of 36 months of incarceration. A hearing is scheduled before this Court on January 4, 2016 to determine the amount of restitution to be ordered in this matter. For the reasons set forth below, the government submits that the Court should order that

Cleveland repay an amount of not less than $55,000.96 in restitution to the thirty victims identified to date.

II. Statement of the Case

In March of 2013, Marlon Cleveland was officially appointed as a Court Officer of the 36th District Court by Order of Chief Judge Kenneth J. King. The appointment order provided defendant Cleveland with authority to enforce orders for the seizure or attachment of property as well as orders requiring arrest. Cleveland was issued an official badge and credentials and carried a personally owned firearm during the execution of those duties. (Presentence Investigation Report, (PSIR) ¶ 7).

Between March of 2013 and April of 2014, Cleveland stole and embezzled tens of thousands of dollars that he collected as a Court Officer but did not report to the 36th District Court or transfer to the prevailing litigants or their attorneys. Over the course of that scheme, dozens of individual defendants were instructed by Cleveland to send monthly payments on their judgments to a post office box in Redford, Michigan. Cleveland kept most of those payments, many of them in the form of money orders, for himself. On several occasions, Cleveland demanded larger payments from individual civil defendants to avoid having their automobiles seized, and thereafter kept those payments himself. (PSIR, ¶¶ 8 – 11).

Cleveland was convicted by plea on June 18, 2015. (Docket No. 14: Rule 11 Plea Agreement). The Probation Department thereafter prepared a Presentence Report which found, among other facts that "agents have identified more than $42,000 in stolen money and tens of thousands of dollars remain unaccounted for." (PSIR, ¶ 11). Cleveland objected to several findings in the PSIR and argued that the loss amount of $5,000 should be used to calculate his sentencing guideline range. The Probation Department declined to change the subject paragraph of the PSIR. (Addendum to Presentence Report, pg. A-3).

On September 23, 2015, the government submitted a chart showing the breakdown of defendant Cleveland's theft of $55,000.96 from 30 different victims who had been identified as of that date. Docket No. 17: Sentencing Memorandum of the United States, Government Sentencing Exhibit 1, pg ID 91-93.[1] On November 9, 2015 Cleveland filed a Sentencing Memorandum in which he argued that "the loss amount in Mr. Cleveland's case is between $25,000 and $39,000." (Docket No. 20, Sentencing Memorandum, Pg ID 97).

[1] A copy of Government Sentencing Exhibit 1, along with 200 pages of related documents from the 36th District Court and 98 pages of related documents from defendant Cleveland's accounts at TCF bank, was sent to defendant Cleveland and his counsel of record on August 17, 2015. The same materials were provided to the U.S. Probation Department pursuant to Rule 32(c)(1)(B) of the Federal Rules of Criminal Procedure.

An initial sentencing hearing was held on November 17, 2015 at which time the Court resolved several contested sentencing guideline factors. The Court set an additional evidentiary hearing for December 10, 2015 to determine the loss amount under the sentencing guidelines. Prior to that hearing, the parties stipulated to all relevant guideline factors, including a stipulation that the "amount of funds obtained by Marlon Cleveland was more than $15,000 and less than $40,000 resulting in an increase of 4 levels under § 2B1.1(b)(1)(C) & § 2C1.1(b)(2) of the November 1, 2015 edition of the Sentencing Commission's *Guidelines Manual*." The written stipulation between the parties further provided: "In making this agreement as to the amount of loss under the Sentencing Guidelines, the government expressly reserves the right to argue that the amount of restitution to be imposed in this matter is greater than $40,000." (Stipulation on Sentencing Guideline Calculations, ¶ 3).

On December 10, 2015 the Court imposed a sentence of 36 months of incarceration. A hearing has now been set for January 4, 2016 to determine the amount of restitution to be imposed in this matter.

III. Legal Argument

Restitution in this matter is mandatory

As stated by the Sixth Circuit, the "principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time (internal citations omitted)." *United States v. Lively*, 20 F.3d 193, 202 (6th Cir. 1994). As part of his Rule 11 Plea Agreement, defendant Cleveland expressly agreed that restitution is mandatory in this case. (Docket 14: Rule 11 Agreement, pg ID 48). The Probation Officer likewise found that restitution must be ordered pursuant to 18 U.S.C. § 3663A, the Mandatory Victims Restitution Act (hereafter, MVRA). PSIR, ¶ 64.

Under the MVRA Cleveland is to be ordered "to return the property to the owner of the property" unless doing so is "impossible, impracticable or inadequate" in which case Cleveland is to be order to pay an amount equal to the greater of the value of the property "on the date of the loss" or on the "date of sentencing." 18 U.S.C. § 3663A(b)(1)(A). Here the subject property consists of tens of thousands of dollars in funds that Cleveland stole over the course of many months from dozens of different victims. It is both impossible and impracticable for Cleveland to return those funds because, it appears, he spent them on items such as jewelry, furniture and video games.

The sum of $55,000.96 is a reasonable estimate of the victims' losses

In a fraud case, "[w]here difficulties arise in establishing the exact amount of restitution, a district court may accept a reasonable estimate of the loss based on the evidence presented . . . [w]hen making a reasonableness determination of the restitution amount, district courts should resolve uncertainties with a view toward achieving fairness to the victim." *United States v. Rouhani*, 598 Fed.Appx. 626, 632 (11th Cir.2015) (internal quotations and citations omitted); *see also United States v. Burdi*, 414 F.3d 216, 221 (1st Cir.2005) ("In calculating the restitution amount under [the MVRA], absolute precision is not required ... the district court's obligation was to attempt to come to a reasonable determination of appropriate restitution by resolving uncertainties with a view towards achieving fairness to the victim.") (internal quotations and citations omitted).

In determining the proper amount of restitution, the burden is upon the government to establish, by a preponderance of the evidence, the amount of the loss sustained by a victim. *United States v. Kratt*, 579 F.3d 558, 565 (6th Cir. 2009). In this case the government has more than satisfied the preponderance of evidence threshold.

On September 23, 2015, the government submitted a chart showing the breakdown of defendant Cleveland's theft of $55,000.96 from 30 different victims

who had been identified as of that date. Docket No. 17: Sentencing Memorandum of the United States, Government Sentencing Exhibit 1, pg ID 91-93. The following methodology was used in preparing that loss summary.

During his interview with FBI agents on November 20, 2014, Cleveland admitted to the basic pattern he followed in stealing money during and after the time he held the position as a Court Officer. As part of that scheme, Cleveland would prepare an MC 82 for seized property, provide one copy of the MC 82 to the individual whose money was being seized, and thereafter fail to file the MC 82 with the Court or provide a copy to the prevailing party.

During the search of Cleveland's home and his Cadillac Escalade vehicle, agents located numerous copies of MC 82 forms for seizures made by Cleveland in 2013 and 2014 with the "Court Copy" sheet still attached. Agents thereafter compared the copies of the seized MC 82 forms against the official Register of Actions maintained by the 36th District Court for each individual case, to determine if there was any record of the subject funds being submitted to the Court or being transferred to the prevailing party or their attorney.

In certain instances (identified as victims 1 through 5 on Gov't Sent. Ex. 1), agents took steps to interview the prevailing parties or their counsel to confirm that Cleveland never turned over the funds he had seized pursuant to a judgment of the

36th District Court. In other instances (identified as victims 6 through 9 on Gov't Sent. Ex. 1) Cleveland admitted to stealing funds in that case during his interview on November 20, 2014. The loss amounts for victims 10 through 30 were calculated by comparing the "Court Copy" of the MC 82 which was found at Cleveland's home against the official Register of Action of the 36th District Court. It should be noted that, in instances where the Register of Action included *any* entry showing that a payment had been made to the prevailing party (such as for victim 12 and for victim 25) defendant Cleveland was given "credit" for those amounts even absent a confirmation from the prevailing parties or their counsel that the money was, in fact, turned over by Cleveland.

Based on the foregoing, there is good reason to believe that the estimated loss in Government Sentencing Exhibit 1 *undercounted* the total actual loss and, by extension, the amount of restitution owed by defendant Cleveland. For the majority of the victims (Nos. 10 through 30) identified on Gov't Sent. Ex. 1, the loss amounts depended on the discovery of an unfiled MC 82 during the search of Cleveland's residence and vehicle. Hence, in situations where Officer Cleveland either failed to issue an MC 82 at the time he stole money from a victim, or subsequently discarded or lost that document, those loses would not be included on Government Sentencing Exhibit 1.

In addition to Government Sentencing Exhibit 1, the record in this matter also contains ten separate Declaration of Victim Loss statements received by the U.S Probation Department.[2] A review of the subject Victim Loss statements reveals the following:

1. Several of the losses reported to the U.S. Probation Department match the estimated amounts on Government Exhibit 1 almost to the dollar. *Compare* Declaration of Victim Loss No. 4 (Lori Meek) reporting a loss of $900 with Government Exhibit 1, Line 1 (Lori Meek) listing an estimated loss of $900. *Compare* Declaration of Victim Loss No. 10 (Carol Johnson) reporting a loss of $1,050 with Gov't Ex. 1, Line 4 (Carol Johnson) listing an estimated loss of $1,100.

2. Several of the losses reported to the U.S. Probation Department exceed the estimated amounts listed on Gov't Ex. 1. *Compare* Declaration of Loss No. 8 (Patrice Glass) reporting a loss of $5,000 and Gov't Ex. 1, line 4 (Patrice Glass) estimating a loss of $2,400. *Compare* Declaration of Loss No. 9 (Odessa Cook) reporting a loss of $3,000 and Gov't Ex. 1, line 2 (Odessa Cook) estimating a loss of $1,400.

   Several victims, including Ms. Glass and Ms. Cook, included a dollar amount for pain and suffering in the Declaration of Loss submitted to the Probation Department. Victim Glass included the sum of $2,415 and Victim Cook included the sum of $3,000.

   While, under certain circumstances, the MVRA does allow a court to order restitution to pay an amount equal to the cost of psychological or psychiatric care and treatment, the government submits that recovery for pain and suffering is not appropriate in this particular case. After

[2] Copies of the subject victim letters were provided by the U.S. Probation Department to the parties on October 20, 2015. Counsel for the government is unable to determine whether any of the victims were provided notice of the individual restitution amounts submitted to U.S. Probation by the government, as set forth in 18 U.S.C. 3664(d)(2)(A)(ii).

> subtracting sums the victims assigned to pain and suffering – the remaining losses claimed by Victim Cook ($1,701.75) and Victim Glass ($2,585.00) closely approximate the loss estimates of $1,400 and $2,400 respectively listed on Gov't Ex. 1.

Given the nature of the underlying crimes in this matter it should come as no surprise that many victims would choose to avoid any additional contacts with the justice system no matter what solicitation materials were provided to them. It is also highly likely that many victims would be without any records of payment made to, and stolen by, former Officer Cleveland or lack the means for obtaining records from the 36th District Court, circumstances which would further complicate the preparation of a Declaration of Victim Loss.

While the ten responding victims should be commended for their efforts, there is no requirement that any victim participate in these proceedings with the filing of a Declaration of Loss or otherwise. *See* 18 U.S.C. 3664(g)(1) ("No victim shall be required to participate in any phase of a restitution order"). But the preparation and filing of a Declaration of Loss has never been held to be a legal prerequisite for a victim to be eligible for restitution. The uncontested record shows a pattern of thefts by Cleveland that spanned many over many months and a conservative methodology used by the government shows that the total amount of victims' losses comes to $55,000.96. Each of defendant's thirty victims deserves is entitled to the repayment of their stolen funds. *See United States v. Futrell*, 209

F.3d 1286, 1292 (11th Cir. 2000) ("The law cannot be blind to the fact that criminals rarely keep detailed records of their lawless dealings, totaling up every column and accounting for every misbegotten dollar. Hence, the preponderance standard must be applied in a practical, common-sense way. So long as the basis for reasonable approximation is at hand, difficulties in achieving exact measurements will not preclude a trial court from ordering restitution").

Cleveland bears the burden of establishing any Offset to the victim loss amounts

In calculating loss amounts to be compensated in a restitution order, "[t]he burden of proving an offset should lie with the defendant." *United States v. Elson*, 577 F.3d 713, 734 (6th Cir. 2009). In his Sentencing Memorandum filed on November 9, 2105, Cleveland challenged the government's loss estimates arguing that those numbers did "not take into account the legitimate income owed to Mr. Cleveland." (Docket No. 20: Defendant's Sentencing Memorandum, Pg. ID 97). At a later point Cleveland claimed there were "instances where the government erroneously concluded that plaintiffs had not been paid when they had been". (Id, Pg. ID 98). More than six weeks later, Cleveland has still not provided the Court, the Probation Department or the government with any financial records, register of action records or other information to support either of those claims.

To the degree that Cleveland is claiming entitlement to statutory fees or expenses that would be due to a legitimate Michigan Court Officer, the right to any such payment was forfeited by Cleveland's own criminal actions. As the uncontested record reveals, defendant Cleveland willfully and repeatedly failed to prepare, file or serve the requisite inventory and receipt forms for seized funds; failed to use a separate bank account to safeguard seized funds; failed to provide names and addresses of individuals who regularly assisted him; and failed to maintain bills and receipts for his 'services.' Each such requirement is expressly imposed upon an honest Court Officer under the very Michigan statutes and court rules Cleveland apparently relies upon.[3] Cleveland's presumption that the resources of this Court now be devoted to a case by case inquiry in an effort to uncover some phantom recoverable "costs" is unfounded. *See United States v. Zafar*, 291 Fed. Appx. 425, 429 (2d Cir. 2008) ("Nothing in the detailed provisions of the [MVRA] contemplates that a defendant guilty of criminal fraud can escape mandatory restitution by requiring district courts to conduct mini-trials on the possible contributory negligence of the very persons victimized by the defendant").

Cleveland's request to net out his expenses is akin to a bank robber seeking to deduct his out of pocket fuel costs from the gross amount of cash he stole.

[3] See Michigan Court Rule 3.106 and MCL 600.2559.

Courts have wasted little time rejecting similar self-serving claims. *See e.g. United States v. Bahel*, 662 F.3d 610, 648-49 (2d Cir. 2011) (rejecting argument that restitution amount failed to deduct defendant's 'legitimate' salary and observing that defendant's argument "ignores the fact that the money [the victim] paid him was for his honest services, which is what he failed to provide."

Conclusion

For the reasons set forth above, the government requests that the Court impose an order of restitution pursuant to 18 U.S.C. § 3663A requiring Cleveland to pay the thirty identified victims of his crimes a total amount of not less than $55,000.96.

Respectfully submitted,

BARBARA L. MCQUADE
United States Attorney

s/Bruce C. Judge
BRUCE C. JUDGE
Assistant United States Attorney
211 West Fort Street, Suite 2001
Detroit, MI 48226
(313) 226-9122
Bruce.Judge@usdoj.gov
CA Bar No. 148805

Dated: December 28, 2015

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2015, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

Andrew Densemo
Attorney for Marlon Cleveland

s/Bruce C. Judge
BRUCE C. JUDGE
Assistant United States Attorney
211 West Fort Street, Suite 2001
Detroit, MI 48226
(313) 226-9122
Bruce.Judge@usdoj.gov
CA Bar No. 148805

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